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No. 04-163

IN THE

Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON U.S.A. INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a regulation that deprives respondent of a specific property interest (the right to collect market rents from real property) without compensation effects a taking in violation of the Just Compensation Clause when there is no contention that the rents prohibited by the regulation are or would be the source of any problem the regulation seeks to address.

2. Whether the Just Compensation Clause requires nothing more than the "mere rationality" review applied under the Due Process Clause, or whether, as this Court has repeatedly held, meaningful scrutiny is required to protect interests expressly guaranteed by the Just Compensation Clause.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's rules, respondent Chevron U.S.A. Inc. ("Chevron") incorporates by reference the disclosure statement in its opposition to the petition for *certiorari*.

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STATEMENT OF THE CASE

Chevron (like its competitors) markets gasoline in Hawaii through several different distribution avenues. One is to sell directly to consumers through service stations the company itself owns and operates. Another is to sell to dealers who own their stations (so-called "open" dealers). A third is to sell to lessee dealers, who lease their service stations from Chevron.

The State has decided that Hawaii consumers will benefit if lessee dealers remain in business. It is at least debatable whether it makes sense to favor lessee dealers over other distribution avenues, but the wisdom of the State's choice is not at issue here. Instead, the question is whether the State can attempt to implement its policy by requiring Chevron to forgo rents, when even the State does not claim the rents have been the source of any problem the State is seeking to address.

A. Act 257 and the State's Asserted Purposes

The Hawaii Legislature enacted Act 257 in 1997. The stated purpose of the act is to combat the effects of alleged concentration in the Hawaii market for gasoline, which the Legislature said was resulting in higher gasoline prices and hurting consumers and the public. Pet. Br. App. 1-2. The act seeks to accomplish this goal by, among other things, dictating the maximum rent Chevron and other oil companies may collect under their agreements with lessee dealers. Rent is capped at 15% of the dealer's profit on gasoline sales plus 15% of the dealer's gross sales on products other than gasoline, plus (where applicable) a percentage increase equal to any increase the oil company is required to pay on its ground lease. Pet. App. 122.

For eleven of Chevron's lessee-dealer stations in Hawaii, the statute requires that Chevron reduce the rent it would otherwise collect by as much as 45%.[1] These rents are payable to Chevron under lease agreements Chevron enters with its lessee dealers as consideration for the dealer's right to occupy Chevron's service station premises. Chevron makes the entire investment in these stations: it purchases or leases the land and bears the entire expense of building the station. JA 37. Under the leases, Chevron bears the ongoing property expenses, including the ground lease rents, real property taxes, and ordinary maintenance expenses (subject to certain terms of the lease). *Id.*[2]

Although the State's asserted purpose in enacting Act 257 was to combat market concentration, it is undisputed that the Hawaii retail market in which lessee dealers operate is highly unconcentrated. Gasoline is sold at retail in Hawaii from about 300 different service stations. Trial Tr. 95:22. Nearly half of these are lessee-dealer stations, and another 75 or so are open dealers. *Id.* at 92:14-94:9. Chevron's own dealer network is even more heavily skewed toward lessee dealers and open dealers. Chevron operates only 6 of its own stations in Hawaii, while selling to 64 lessee-dealer stations and 6 open dealers. JA 45-47, 117-18.[3] The State's expert

[1] The total rent taken by Act 257 from the eleven stations was stipulated to be about $207,000 per year. JA 45-47.

[2] At each of its stations, Chevron also earns revenues from selling gasoline under a separate supply agreement. JA 37-38. As the State notes, when that source of revenue is included, Chevron has stipulated that its total return on its service station investments is sufficient to satisfy constitutional standards. JA 40. The State correctly does not contend, however, that Chevron's ability to earn revenue from selling other products permits the State to take Chevron's rent.

[3] Other companies are similar. Shell sold to 35 lessee dealers and 17 open dealers, with no company-operated stations. Trial Tr. 93:17-21. Unocal had only three company-operated stations, compared to 29 lessee dealers and 13 open dealers. *Id.* at 93:12-16. Texaco had roughly the same number of lessee-dealer stations and company-operated stations. *Id.* at 93:22-24. Only two smaller wholesalers had opted not to do business largely through lessee-dealer stations. *Id.* at 93:25-94:9. This includes Aloha, the only Hawaii-based wholesaler, which had 16 company-operated stations and just one lessee-dealer station and which is thus largely, if not entirely, unaffected by Act 257. *Id.* at 94:3-9.

witness admitted that, by any measure, this retail market in Hawaii is "very unconcentrated" and "highly competitive." JA 118. As he testified, "the market is already overbuilt with stations or oversupplied with stations." JA 122.

Given this evidence, the State does not claim that the rents Chevron or other oil companies have charged in Hawaii have been too high or are otherwise the source of any adverse market condition. If anything, the opposite is true. Not only has an extensive lessee-dealer network developed under the rents that Chevron and others have been collecting, but the State stipulated below that Chevron's rents have been below that necessary for Chevron to recoup its expenses associated with lessee-dealer stations. JA 40. Rents have thus been set at levels to induce more, rather than fewer, lessee dealers to do business with Chevron. As the State's expert testified, it would be simply "not true" to assert that "Chevron is charging excessive rents in Hawaii" in an effort "to drive [its] lessee-dealers out of business." Trial Tr. 105:19-25.[4]

It was also undisputed below that the rents Chevron and others have been charging—and that are now prohibited by Act 257—have not caused high retail gasoline prices. The State's expert identified several factors contributing to

[4] Nor can it be said the total economic package Chevron is offering to dealers makes their existence unprofitable. As the State stipulated and its expert admitted, that package has been sufficiently attractive that incumbent dealers have been able to sell their dealership rights (including the leasehold interest and obligation to pay rent) to new dealers for amounts of up to $500,000. JA 42; Trial Tr. 106:1-14.

allegedly high gasoline prices in Hawaii, including concentration at the *wholesale* level, relatively high State gasoline taxes, and high entry barriers at the wholesale level. JA 120-26. He testified, however, that rent charged to lessee dealers was not one of these factors. JA 126. The State makes no claim otherwise.

The State likewise does not claim that the forced reductions in rent that Act 257 imposes will cause lessee dealers to lower their retail gasoline prices to consumers. As the State acknowledged to the district court, "[b]oth [parties'] economists agree that as a matter of economic principle, this will not happen. If the dealer has money in his pocket [from a rent reduction], it is not expected that he will hand it over to the consumer in the form of lower prices." Def's Final Written Arg. (filed 3/8/02), p. 2 (Supp. ER 41).

In fact, the evidence at trial established, and the district court found, Pet. App. 40-41, that the likely effect of the rent cap would be to cause retail gasoline prices to *increase*. Faced with the lost revenue from the rent cap, oil companies would likely seek to recoup that revenue by increasing their wholesale gasoline prices. JA 153-54. And both sides' experts testified that the price consumers pay for gasoline would increase if the oil companies did so. JA 119, 135-36, 151. The State's expert suggested that the competitive market for gasoline sales would not allow the oil companies to sustain any wholesale price increase and that the oil companies would therefore be unable to recoup the lost rent. JA 98-99. If that were the case, however, both experts agreed that the effect of the forced reduction in overall revenues from lessee-dealer stations would be to penalize investment in such stations and reduce the oil companies' incentive to make such investments, JA 55, 138, 143, 148—precisely the opposite of the goal the State says it is seeking to achieve.

Moreover, to the extent that the oil companies are not able to recover the lost rent, the State conceded that the effect will

be to cause the value of the dealer's leasehold to increase. JA 136-37. That increased value would, on average, equal the present value of the reduced rent and would result in a premium that the lessee dealer could realize upon sale of the leasehold. *Id.* (Unlike residential renters, lessee dealers have a statutory right to renew their lease agreements and the right to transfer the leasehold. JA 40-41.)

But regardless of whether the act would actually cause retail gasoline prices to increase or lead to reduced investment in lessee-dealer stations, it remains uncontested that the rents Chevron has charged its lessee dealers have not been the cause of any adverse market effects and that the rent reduction forced by Act 257 will simply be captured by the dealers and will not cause them to lower prices to consumers.

Faced with these uncontroverted facts, the State asserts not that the Legislature was motivated by any extant problem caused by rents charged to dealers, but instead that it enacted Act 257 to "maintain the benefit" of a "multiplicity of independent lessee-dealerships" that has existed under the rents that Act 257 would prohibit Chevron from charging. Pet. Br. 2. It says the statute was passed to "forestall" the "possibility that oil companies might try" at some future date to "rais[e] rents to the point that existing dealers would be forced out of business." *Id.* at 3. According to the State, if that were to occur, the result would be an "oligopolistic concentration in the retail market" mirroring that allegedly existing in the wholesale market, leading to higher gasoline prices for consumers. *Id.* at 2.

The State does not contend that Chevron or any other oil company has engaged in such rental practices in Hawaii. The "multiplicity of independent lessee-dealerships" that the State admits exists in Hawaii belies any such contention. The State has never explained why Chevron would contract with lessee dealers only to drive them out of business and replace them with company-owned stations that it chose not to establish in the first place. Indeed, the State's expert (on

whose testimony the State relies as establishing the purposes and bases for Act 257) testified that he was not aware of any evidence that Chevron or other oil companies were trying to use excessive rents to drive lessee dealers in Hawaii out of business. Trial Tr. 162:11-163:2.

But even if Chevron might someday try to use rent increases to run lessee dealers in Hawaii out of business (and even if the possibility of such future conduct were sufficient to justify taking Chevron's property), the State does not contend that the rents the State stipulated Chevron would collect under its lease agreements absent Act 257, *see* JA 38, 45-47, have had or ever would have that effect. Indeed, the statute freezes rents at a level *below* that necessary for Chevron to recoup its expenses associated with its lessee-dealer stations in Hawaii. JA 38.

Act 257 was unaccompanied by any legislative findings supporting the rationale advanced in the State's brief. There was no determination, for example, that the rents charged to dealers were the cause of any concentration in the Hawaii market, that such rents caused, or might cause in the future, higher prices to consumers, or that capping rents would hold down gasoline prices. The State introduced no evidence below that the Legislature had conducted any hearings or compiled any evidence on these issues.

B. The Decisions Below

Chevron brought suit in federal district court in Hawaii seeking a determination that Act 257 effects an uncompensated taking in violation of the Fifth Amendment. The parties initially submitted the case to the court on stipulated facts and cross-motions for summary judgment. The court (Judge Kay) granted Chevron's motion for summary judgment, holding that the statute would not substantially advance its purposes but would instead merely create a premium in the value of the leases that incumbent dealers could capture when transferring the leasehold. Pet. App. 94-118.

On appeal, the Ninth Circuit held that the district court had applied the proper legal standard in requiring that the statute substantially advance a legitimate government interest. *Id.* at 58-66. It held that the substantially advances test in this context requires that a "reasonable relationship" exist between the legislation and the goals it was designed to advance. *Id.* at 76. Nonetheless, it held that the district court had "short-circuited the fact-finding process" under that standard by resolving the issue without a trial. *Id.* at 72.

On remand, after additional discovery and a one-day bench trial, the district court (Judge Mollway) ruled that Act 257 effected an uncompensated taking in violation of the Just Compensation Clause. *Id.* at 30-53. Relying on the State's own concessions and the undisputed evidence, the court found that rents charged to lessee dealers have not been the cause of high retail gasoline prices in Hawaii, that dealers would not pass along any rent reductions to consumers in the form of lower gasoline prices, and that there was no evidence that oil companies were likely to try to eliminate lessee dealers by charging excessive rent. *Id.* at 40, 44. It also found that, rather than decreasing gasoline prices in Hawaii or forestalling future price increases, the "direct effect of Act 257 will actually be to cause retail gasoline prices to increase." *Id.* at 44, ¶ 31. The court also found that, even in the absence of price increases, oil companies would "avoid investing in new and existing lessee-dealer stations," leading to "fewer lessee-dealer stations than there would be without Act 257." *Id.* at 49, ¶ 49.

The Ninth Circuit affirmed. *Id.* at 24. It reiterated its holding from its earlier decision that the substantially advances test is a valid takings test. *Id.* at 6-13. It also repeated its previous holding that the intermediate "reasonable relationship" standard is the proper requirement for satisfying the substantially advances test in this context. *Id.* at 13-17. The court determined that the facts found by the district court were not clearly erroneous and supported

the judgment for Chevron under the foregoing legal standards. *Id.* at 17-24.

Judge Fletcher dissented. He did not dispute the continuing validity of the substantially advances test. To the contrary, he acknowledged that it is a "test ordinarily applied to zoning and other land use regulations." *Id.* at 25. Moreover, he agreed with the majority that "[t]he evidence put on by the State's expert in support of Act 257 was sufficiently weak, and the countervailing evidence put on by Chevron's expert was sufficiently strong, that the district court did not err in concluding that th[e substantially advances] test was not satisfied." *Id.* at 26. Nonetheless, Judge Fletcher opined that the substantially advances test does not extend to rent-control legislation unless it is shown that the legislation will necessarily allow the incumbent lessee to collect a premium upon transfer of the leasehold interest, a showing that Judge Fletcher believed had not been made. *Id.* at 26-29.

SUMMARY OF ARGUMENT

For over eighty years, this Court has recognized that the Just Compensation Clause extends to deprivations of discrete property interests imposed by regulation. At the same time, recognizing the government's need to advance its legitimate purposes, the Court has ruled that not all regulatory burdens on property require compensation and that a critical factor in determining when compensation is owed is the character of the government's action. This central focus on the nature of the government's action both flows from the rationale for permitting uncompensated takings by regulation and serves the core purpose of the Just Compensation Clause of preventing the government from unfairly concentrating the burdens of regulation on individual property owners.

The Court's substantially advances test, repeatedly recognized by this Court for over twenty-five years, is a vehicle by which the Court isolates those circumstances in which the character of the government's action requires

compensation. As a contemporary statement of the Court's "noxious use" cases, the substantially advances test focuses on whether the government has improperly singled out individual property owners whose property is not the source of the social condition the government is seeking to address. The test similarly asks whether the government is burdening individual property rights in ways that will not address the problem at issue. Where these circumstances are present, the rationale for permitting deprivations of property rights without compensation is absent and the Just Compensation Clause requires the government to pay for the deprivation should it wish to proceed. The State's argument that the only inquiry in a regulatory takings case is the severity of the regulation's economic impact, or that any inquiry beyond that must be conducted only under deferential due process standards, would improperly eliminate this fundamental inquiry from takings analysis.

The substantially advances test is distinct from the inquiry under the Due Process Clause, in both its purposes and its consequences. It focuses on the fairness of singling out individual property owners for particular burdens, not on the general wisdom or utility of legislation. It implements an express prohibition in the Bill of Rights and is limited to specific rights of "private property." Unlike due process review, it does not bar the government from acting, but rather permits governmental action conditioned on compensation to ensure that the burdens of regulation are fairly distributed. The State's argument that enforcing the requirements of the Just Compensation Clause will herald a return of intrusive *Lochner*-era substantive due process review is thus unfounded. The vice of *Lochner* review was that it permitted courts to invalidate laws in the absence of a specific constitutional prohibition. Enforcing the explicit guarantee of the Just Compensation Clause to further its specific purposes involves no such review, any more than does this Court's enforcement of any of the other specific protections found in the Bill of Rights.

Consistent with its distinct purposes and consequences, the Just Compensation Clause requires more than mere rationality. Instead, it requires meaningful scrutiny of the purposes and effects of the government's action. Contrary to the State's argument, meaningful review does not mean that no deference is to be given to legislative judgments. It does require, however, that the government have made reasonable judgments on the relevant issues and that those conclusions be supported by actual evidence. Here, there is no indication that the Legislature undertook any investigation or gathered any evidence. The statute is unaccompanied by any legislative findings that the rents charged to lessee dealers are the source of any problem or that the rent caps imposed by Act 257 could be a solution. Nor is there evidence supporting any such conclusions. The only effect of the statute is to appropriate and transfer to lessee dealers a valuable property interest belonging to Chevron. No principle of deference is violated by holding that this statute effects a taking absent just compensation.

ARGUMENT

I. LAND-USE REGULATION THAT DOES NOT SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST IS INVALID ABSENT JUST COMPENSATION

This Court has repeatedly recognized, in cases spanning more than a quarter of a century, that land-use regulation that does not "substantially advance" a legitimate state interest is invalid under the Fifth Amendment unless just compensation is paid. The first express articulation of the test occurred in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), where the Court found it "implicit" in earlier cases that an interference with property rights "may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Id.* at 127. Two years later, in *Agins v. Tiburon*, 447 U.S. 255 (1980), the Court expressly held that legislation interfering with

property rights must "substantially advance legitimate state interests" to withstand a Just Compensation Clause challenge, and the Court applied that requirement in upholding challenged zoning ordinances. *Id.* at 260.

The Court has since reiterated the availability of the substantially advances test in a long line of cases. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333-34 (2002) (noting that property owner could have made the argument that non-exaction land-use restrictions "did not substantially advance a legitimate state interest" to support a taking claim); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) (noting that jury instruction requiring "that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions" was "consistent with our previous general discussions of regulatory takings liability"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*, 447 U.S. at 260)); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (noting that the Court had recognized the validity of the substantially advances test "on numerous occasions"); *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992) (noting that there must be "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance"); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*, 447 U.S. at 260)); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (describing the substantially advances requirement as an "integral part[] of our takings analysis"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (noting that the substantially advances test represents part of "our general approach" in takings cases); *see also San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J.,

dissenting) (describing *Agins* as a "clear precedent[] of this Court" establishing that a land-use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests").

These cases recognize the applicability of the test in taking cases generally, and not just to certain narrow kinds of regulatory burdens on property rights. *See, e.g., Tahoe-Sierra*, 535 U.S. at 333-34 (development moratorium); *City of Monterey*, 526 U.S. at 703-04 (denial of permit); *Yee*, 503 U.S. at 530 (rent control); *Dolan*, 512 U.S. at 385 (permit condition); *Nollan*, 483 U.S. at 835-36 (permit condition); *Keystone*, 480 U.S. at 476-77 (statutory restriction on mining operations); *Agins*, 447 U.S. at 260 (zoning ordinance).

The State's position is that these decisions were all an inexplicable mistake—a product of "uncertainty" and "confusion," Pet. Br. 28, regarding the meaning of the Just Compensation Clause. According to the State, the existence of a regulatory taking turns "largely, if not exclusively, on a regulation's economic impact," *id.* at 15, thus rendering irrelevant the relationship between the regulation's purposes and the burden it imposes, or the degree to which the regulation unfairly singles out individual property owners by imposing burdens unrelated to any harm they have caused. In the State's view, all such issues are properly considered, if at all, only under the Due Process Clause.

This Court's precedents have consistently rejected such efforts to drain the Just Compensation Clause of independent meaning in the regulatory takings context. The Court should reaffirm those precedents. As we show in the following sections, the substantially advances requirement flows from, and gives effect to, the core purpose of the Just Compensation Clause of ensuring that regulatory burdens are not unfairly concentrated on discrete property owners. Indeed, the very premise of permitting the government to take away certain property interests through regulation without paying compensation is that the government must be

granted that power to accomplish its legitimate purposes. The State seeks now to retain that power divorced from the circumstance justifying its exercise.

A. The Character of the Government's Action Has Been a Fundamental Part of This Court's Regulatory Takings Jurisprudence for Over Eighty Years

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The State does not dispute that Chevron's right to rent for the occupation and use of its service station premises is "private property" within the meaning of this provision. Indeed, it is a real property interest.[5] Nor can there be any dispute that Act 257 deprives Chevron of that property when it prevents Chevron from collecting the rents it would otherwise be entitled to collect under its contracts with lessee dealers.

Since at least *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), this Court has recognized that such deprivations of private property fall within the Fifth Amendment's

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[5] Rent is paid for the use and enjoyment of land and issues from the profits of the estate. 1 Milton R. Friedman, *Friedman on Leases* § 5.101 (4th ed. 1997); 2 William F. Walsh, *Commentaries on the Law of Real Property* §§ 177-78 (1947). Because rent issues out of the land, rent is an incorporeal interest in property. 2 *American Law of Property* § 9.41 (A. James Casner ed., 1952); Walsh, *supra*, § 177. For that reason, the right to future, unaccrued rents is real property. Casner, *supra*, § 9.41; 1 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 240 (1924) (Rents "are an incident to the reversion and follow the land. They pass with a sale or devise of the land. . . . In fact, although separable from the reversion, they are, until such separation, part of the land."). Hawaii law is in accord. *See Smith v. Smith*, 535 P.2d 1109, 1115-16 (Haw. 1975) ("[T]he right to rent to accrue on a lease for the use or occupancy of real property is an incorporeal hereditament and is an incident to an estate in land, the transfer of which is a transfer of an interest in realty.").

protection, even though they are accomplished by regulation rather than by direct governmental condemnation. As this Court recognized in *Lucas*, this reading of the Fifth Amendment is consistent with its text, which refers to taking property rather than condemning it, and which differs from the more limited text Madison originally proposed. *Lucas*, 505 U.S. at 1028 n.15.[6] It is also consistent with the fact that regulation can destroy property rights no less than direct appropriation. *See San Diego Gas & Elec.*, 450 U.S. at 652 (Brennan, J., dissenting) ("Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."). Indeed, because the destruction of property rights through regulation is typically less "obvious and undisputed" than when the government condemns or physically appropriates property, *Tahoe-Sierra*, 535 U.S. at 322 n.17, regulation often carries with it a greater threat of uncompensated deprivation of constitutionally protected property interests than outright appropriation. As the Court observed in *Mahon*, if taking of property through regulation were broadly permitted, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappears." 260 U.S. at 415.

Although holding that "regulatory" takings fall within the Fifth Amendment, *Mahon* also recognized that the government's need to accomplish its legitimate purposes qualifies the protection otherwise afforded by the Fifth Amendment's unqualified text. As the Court stated, "[g]overnment could hardly go on if to some extent values incident to property

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[6] *See generally* Andrew Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 Am. U.L. Rev. 181 (1999).

could not be diminished without paying for every such change in the general law." *Id.* at 413. Thus, the Court concluded, an "implied limitation" on the Just Compensation Clause exists to permit the government to validly exercise its police power. The Court cautioned, however, that "obviously the implied limitation must have its limits, or the contract and due process clause are gone." *Id.*

Consistent with *Mahon*'s basic premise that it is the government's need to achieve its legitimate purposes that permits an exception to the rule of compensated takings, this Court's regulatory takings cases have consistently focused on the strength of the government's interest in determining whether compensation is required.

In *Penn Central*, the Court held that, "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel." 438 U.S. at 130-31. Thus, the Court recognized that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Id.* at 127. Central to the Court's conclusion in that case that the landmark preservation law did not work a taking was its recognition that the law served "an entirely permissible governmental goal" and that the restrictions it imposed were an "appropriate means of securing th[ose] purposes." *Id.* at 129. The Court further concluded that the law had not "singl[ed] out individual landowners for disparate and unfair treatment." *Id.* at 132. It was only after finding on the basis of these conclusions that the character of the government's action did not invalidate the law that the Court separately analyzed whether the law independently worked a taking because of the "severity of the impact of the law on appellants' parcel." *Id.* at 136.

This Court's other regulatory takings decisions have likewise recognized that the character of the government's

action is a critical determinant of whether compensation is required. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (regulation may restrict property uses "if such public action is justified as promoting the general welfare"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (a taking may occur when "a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation"); *id.* at 634 (O'Connor, J., concurring) ("The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis."); *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting) ("the first and, in some ways, the most important factor in takings analysis [is] the character of the regulatory action"); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (finding a regulatory taking based on the "character of the Government regulation," including that it burdened property rights in ways more broad than necessary and ways counterproductive to the government's goals); *Keystone*, 480 U.S. at 488 ("the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred"); *Yee*, 503 U.S. at 530 ("whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance" bears on the existence of a regulatory taking).

The State's argument that the existence of a taking depends "largely, if not exclusively," on the severity of the economic impact, Pet. Br. 15, is irreconcilable with these precedents. In effect, the State seeks a one-way ratchet, under which the nature of the government's interest works only in the government's favor. Under the State's approach, the government is granted the power to burden discrete property interests to advance its legitimate purposes, but no inquiry is permitted into whether the government's action is properly related to those purposes or whether instead "private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018.

The Just Compensation Clause exists "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see Agins*, 447 U.S. at 260 ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."). But under the State's approach, no vehicle exists for ensuring that this core constitutional purpose is served. So long as the government can cite some public purpose and has not completely destroyed the property's economic value, the inquiry would be over, without any examination into whether the government has unfairly singled out discrete property owners for burdens that should be borne by the public as a whole. *See Lucas*, 505 U.S. at 1067 (Stevens, J., dissenting) (recognizing that "the risks of such singling out are of central concern in takings law" and that "[a] regulation may single out a property owner without depriving him of all of his property"). This Court's focus on the nature of the government's interest prevents that result.

B. The Substantially Advances Test Furthers Fundamental Just Compensation Clause Purposes by Focusing on the Required Connection Between the Governmental Interest Asserted and the Burden on Property Interests

The requirement that a regulation substantially advance a legitimate state interest stems directly from the foregoing principles. It gives content to the Court's inquiry into the "character of the government's action" and ensures that the fundamental purposes of the Just Compensation Clause are not frustrated.

At the threshold, the substantially advances test focuses on whether the property that is the target of the government's regulatory action is the source of the social evil the

government seeks to remedy. In *Lucas*, this Court recognized that the substantially advances test is the Court's "contemporary statement[]" of its historical recognition that government may burden property rights to prevent a "harmful or noxious use." 505 U.S. at 1023-24. Thus, a baseline requirement of the Court's regulatory takings cases has been that a causal connection exist between the property uses prohibited and the social condition the government seeks to address. A land-use regulation cannot be said to substantially advance a legitimate governmental purpose if it burdens property that has not contributed to the problem at issue or is not distinctively interfering with any solution. Thus, the law that was upheld in *Penn Central* prevented renovations that would destroy the historic character of landmarks. 438 U.S. at 109. In *Agins*, the prohibited development would have frustrated "the city's interest in assuring careful and orderly development of residential property." 447 U.S. at 262. In *Keystone*, the law prevented coal mining that would cause subsidence of the surface. 480 U.S. at 491 (government was acting to "restrain[] uses of property that are tantamount to public nuisances"). In *Nollan*, the Court recognized that the requested development could be denied outright if the Nollans' new house "would substantially impede" the state's purposes. 483 U.S. at 835. And in *Tahoe-Sierra*, the Court observed that a substantially advances challenge to the development moratorium at issue there was foreclosed by the district court's finding that the moratorium "represented a proportional response to a serious risk of harm to the lake" created by the proposed development. 535 U.S. at 334.[7]

[7] This Court's earlier cases are to the same effect. *See, e.g., Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (imposing requirements on sand and gravel excavation activities to prevent destabilization of surrounding properties); *Miller v. Schoene*, 276 U.S. 272 (1928) (requiring removal of cedar trees that were causing damage to adjacent apple trees); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting operation of a brickyard in a residential neighborhood); *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibiting use of a building as a brewery).

As *Lucas* discussed, the distinction between regulations that prevent harm and those that confer benefits is "often in the eye of the beholder," 505 U.S. at 1024, and thus the Court's more recent cases analyze the question in terms of the government's police power rather than "noxious use." Similarly, the Court has recognized that the government's police power is not limited to instances of unlawful conduct or "moral wrongdoing." *Id.* at 1023 (quoting *Penn Central*, 438 U.S. at 133 n.30). But the Court has consistently required that the property use at issue be the source of the condition the government is seeking to address.

In some cases, even where such a causal connection exists, the Court has found the law invalid under the more general *Penn Central* balancing test because the burden on property rights was too severe in relation to the governmental interest to be served. *E.g., Hodel v. Irving*, 481 U.S. 704 (1987) (finding a taking even though a causal connection existed between the devising of small, undivided interests in Indian lands and the problem of fractionated ownership Congress sought to correct).

But no such balancing is necessary when, at the threshold, the property taken is not the source of the condition sought to be corrected. In that circumstance, compensation must be paid because no basis exists for requiring the property owner to shoulder the economic burden imposed by the statute. *See Armstrong*, 364 U.S. at 49; *see also Pennell v. City of San José*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (traditional land-use regulation satisfies the Just Compensation Clause "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy"). By ensuring that governmental action burdens only those property uses that are "the source of the social problem," the causal nexus required by the substantially

advances test prevents a regulated landowner from being "singled out unfairly" by legislation seeking to remedy social problems not attributable to his or her property. *Pennell*, 485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part); *see Nollan*, 483 U.S. at 835 n.4 (discussing application of Just Compensation Clause where property owners are "singled out to bear the burden" of remedying a problem to which they have not contributed more than others); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (Just Compensation Clause prevents government from "loading upon one individual more than his just share of the burdens of government").

This case vividly illustrates these dangers. There is no claim that the rents charged to lessee dealers in Hawaii have been the source of high gasoline prices or have impeded any effort by the State to address those prices, let alone any claim that rents have contributed to high gasoline prices more than other factors. Nor is there any contention that rents have contributed to any market concentration. In fact, the opposite is true. There is thus no basis for singling out those rents to shoulder the burden of the State's regulation—and no rationale for permitting the government to take Chevron's property interests without compensation. The State is simply taking the property of Chevron and other out-of-state wholesalers to subsidize the operation of local lessee dealers. Whether or not it is a wise public policy choice to seek to enhance the dealers' fortunes in this fashion, the State may not achieve that goal "by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 416; *see Keystone*, 480 U.S. at 483 (compensable taking occurs when property is taken "merely to augment the property rights of a favored few") (internal quotation marks omitted).

In describing the substantially advances test as inquiring only into the "effectiveness" of government action, Pet. Br. 17, the State disregards this threshold function of the test in preventing unfair singling out of individual property owners whose property is not the source of the problem being

addressed. By asserting that the only inquiry in a regulatory takings case is the degree of economic impact, or that any inquiry beyond that must be conducted only under deferential due process standards, the State seeks to eliminate this fundamental inquiry from takings analysis, or render it wholly ineffectual. The United States suggests that this singling out issue should be addressed as part of a general balancing under *Penn Central*. U.S. Br. 11 n.2. But it does not explain why, so long as there is a burden on discrete property rights (as there is here), the fact that the government is singling out a property owner who is not the cause of the problem should be merely one "factor" to balance and not sufficient by itself to require compensation. Neither the State nor its amici identify any compensating factor that could justify such an intrusion on protected property rights.

In related fashion, the substantially advances test also serves to identify those cases in which the burden on property rights is not sufficiently related to the purpose to be served. Even where a property use may be the source of a problem, no legitimate basis exists for singling out that property for a special burden if the burden will not contribute to the problem's solution. In that circumstance as well, the rationale for taking property rights without compensation—the government's need to achieve its legitimate purposes—is absent and the core purpose of the Just Compensation Clause in preventing unfair concentration of burdens on discrete property rights is violated. The government is again merely transferring property rights "under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018.

Thus, in *Nollan*, there was no question that the proposed property use (significantly expanding an existing beachfront home) would contribute to the evils the Coastal Commission said it was acting to prevent—*e.g.*, obstruction of views of the beach and the creation of a psychological barrier to use of the beach. 483 U.S. at 835. But the burden the Commission imposed—requiring the Nollans to permit

access across their property to persons already on the beach—did not advance that purpose. *Id.* at 838. Thus, although the government's actions did not destroy the economic value of the Nollans' property, the Court found the government's regulatory action to constitute a taking.

Similarly, in *Dolan*, Ms. Dolan's proposed expansion of her retail store and parking lot would have been the source of increased traffic and stormwater run-off. A connection therefore existed between the proposed property use and the city's demand that Ms. Dolan dedicate a portion of her property to a greenway and bicycle path. 512 U.S. at 387. The Court nonetheless found a taking because the regulatory burdens were not shown to advance the city's purposes.[8] Requiring a public greenway did not advance the city's flood control purposes because a private greenway (*i.e.*, a requirement that Ms. Dolan leave the area undeveloped but without obligating her to grant public access) would accomplish the same result. *Id.* at 393-95. Similarly, the city had not shown that the bicycle path requirement was reasonably related to any increased traffic because it had not made an effort to quantify in any respect the degree to which the bicycle path would reduce the traffic impact. *Id.* at 395-96.

The State argues that the dispositive factor in *Nollan* and *Dolan* was that the government was seeking to extract rights of physical access to the plaintiffs' property. Pet. Br. 45. But the Court's analysis was not so limited. The relevant point was that the burden being demanded was one the government could not have directly imposed without paying compensation and its legitimacy therefore depended on some other justification. That is true whether the government is demanding an easement or imposing a regulatory restriction

[8] As in *Nollan*, there was no issue that the regulatory demand would deprive Ms. Dolan of the economic value of her property. *Dolan*, 512 U.S. at 385 n.6.

that could not be independently imposed. The outcome of *Nollan* would not have been different had the Coastal Commission conditioned the permit on the Nollans agreeing not to sell the property or not to occupy it for specified hours each day.[9] Nor would *Dolan* have been differently decided had the city required Ms. Dolan to dedicate as private open space land on the other side of the city if that would not address the runoff and traffic problems at issue. Under this Court's precedents, such regulatory burdens unconnected to a legitimate and related purpose cannot be imposed without compensation, whether they are imposed absolutely or conditionally.

C. The Due Process Clause Does Not Dictate the Standard for Evaluating Rights Under the Just Compensation Clause

1. The Governing Constitutional Standard Depends on the Nature of the Constitutional Prohibition at Issue

This Court's requirement that a land-use regulation substantially advance a state interest cannot be dismissed, as the State contends, Pet. Br. 23, as a "mistaken transposition of substantive due process doctrine into takings law." The State's apparent assumption is that any inquiry into the degree to which a regulation serves legitimate purposes is necessarily a due process challenge. The United States echoes this assertion, and suggests that all "economic legislation" enjoys broad immunity from meaningful review under the Constitution. U.S. Br. 13 (referring to "[t]he

[9] That *Nollan*'s analysis is not limited to exactions, but reflects a broader application of the substantially advances test, is demonstrated by the Court's recognition that even an outright denial of the requested permit would not be proper without compensation unless the Nollans' new home "would substantially impede" the Coastal Commission's legitimate interests. 483 U.S. at 835-36.

preeminence of legislative authority in the sphere of economic policy").

This is precisely the assertion this Court rejected in *Dolan*, when it held that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights." 512 U.S. at 392. As the Court observed, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Id.*[10]

Numerous cases confirm that economic legislation enjoys no special immunity from review when protection of a right specifically delineated and protected in the Constitution is at issue. Under the First Amendment, commercial speech holds a "subordinate position" and "does not stand on a par . . . with forms of speech more traditionally within the concern of the First Amendment" because commercial speech concerns purely economic matters. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Even so, commercial speech is not stripped of all constitutional protection save that of substantive due process. To satisfy the Free Speech Clause, economic regulation of commercial speech must directly advance a substantial state interest and

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[10] *See also Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right.

Id. at 552; *see VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795) ("[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.").

be no more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565 (1980). In determining whether economic legislation advances the state's interest, the state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *accord Cent. Hudson*, 447 U.S. at 564 (the state must provide more than "ineffective or remote support for the [state's] purpose").

Likewise, economic legislation that burdens interstate commerce is reviewed directly under the Commerce Clause, and under a standard tailored to the interests protected by that clause. Legislation that discriminates against interstate commerce is virtually *per se* unlawful. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). Non-discriminatory regulation of commerce is upheld only if the economic legislation advances the state's interest such that the local benefits outweigh the burdens on commerce. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945). To satisfy that standard, a state must put forth "persuasive evidence" that the economic regulation furthers the state's interest. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671 (1981). A state may not avoid compliance with the Commerce Clause simply by providing a rational basis for economic legislation because to allow a state to do so "would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *see also Barnard v. Thorstenn*, 489 U.S. 546, 551, 552 (1989) (applying intermediate scrutiny to invalidate under the Privileges and Immunities Clause a state rule limiting bar admission to residents; requiring that the rule "bear[] a substantial relationship to the State's objectives").

As these cases demonstrate, the Due Process Clause is not the only check on governmental action in the economic sphere. Nor does it set the standard of judicial review for the

entire class of economic legislation. The governing standard is instead determined by the constitutional rights at issue: "[I]t is the character of the right, not of the limitation, which determines what standard governs [a constitutional claim]." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "[T]he standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (reviewing economic legislation). The Constitution protects *rights*, not legislation.

Indeed, the Court has held that, "if a constitutional claim is covered by a specific constitutional provision, . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

2. *The Just Compensation Clause Is a Specific Constitutional Prohibition That Serves Purposes Distinct from Those of the Due Process Clause*

The Just Compensation Clause is such an explicit source of constitutional protection. It does not duplicate the requirement of the Due Process Clause that "due process of law" be provided before someone is deprived of "life, liberty or property."[11] Nor does it protect a generalized interest

[11] *Cf. Eastern Enters. v. Apfel*, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting) ("Nor does application of the Due Process Clause automatically trigger the Takings Clause, just because the word 'property' appears in both. That word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way the term is interpreted.").

against arbitrary, unfair, or irrational governmental behavior. Instead, as discussed above (at 17-23), by permitting the government to act conditioned on paying just compensation, it serves the distinct purpose of ensuring that individual property owners are not made to bear alone "public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

Because the Just Compensation Clause is an express constitutional protection of a specific interest, the State's concern that enforcing the clause's basic purposes will herald a return of *Lochner*-era substantive due process review is unfounded. The vice of the *Lochner* period was use of the "vague contours of the Due Process Clause" to strike down state laws not "restrained by some express prohibition in the Constitution of United States." *Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting); *see also Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) ("It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, *so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law*." (emphasis added) (internal quotation marks omitted)). Untethered to any concrete basis in specific constitutional text, the courts invalidated laws based on their view of the law as "unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).

Neither this Court's focus on the nature of the government interest in regulatory takings cases, nor its specific

requirement that the regulation at issue substantially advance a legitimate state interest, licenses that kind of unconstrained judicial review. Unlike the *Lochner*-era due process cases, this Court's precedents applying the substantially advances requirement of the Just Compensation Clause do not sanction judicial second-guessing of the legitimacy of legislative ends.[12] The validity of the ends to be achieved is evaluated under the "public use" requirement, which this Court has held is governed by a highly deferential standard. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). The substantially advances requirement imposes no higher standard for evaluating the legislative purpose. *See Agins*, 447 U.S. at 261 (recognizing that the purpose of the zoning law to protect against the "ill effects of urbanization" has "long been recognized as legitimate"); *Nollan*, 483 U.S. at 835-36 (accepting as legitimate the government's interest in preserving views of the beach).

Nor does the substantially advances requirement evaluate the general wisdom or utility of legislation. The focus is instead on whether the law has unfairly singled out individual property owners for burdens that the public as a whole should bear. By asking whether the law substantially advances the governmental purpose, the courts evaluate whether the burden is properly placed on property that is the source of the problem at issue and whether the burden addresses that problem. *See supra*, pp. 17-23.[13]

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[12] *Cf. Coppage v. Kansas*, 236 U.S. 1 (1915) (finding illegitimate a legislative purpose to protect employees' ability to associate with a union).

[13] *See also* Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630, 1651 (1988) ("the nexus requirement to be applied in these cases measures not just the closeness of the fit between regulatory means and ends but also whether the burden of the regulation is properly placed on this landowner").

The Just Compensation Clause also differs from the Due Process Clause in that it is limited to "private property." Regardless of how the Court ultimately resolves the debate over precisely how to define "private property" for purposes of the Just Compensation Clause, *see infra*, pp. 37-38 (discussing *Eastern Enterprises*), that clause has a much narrower reach than the more broadly phrased Due Process Clause, which applies to deprivations of "life, liberty, or property." Thus, applying the substantially advances test under the Just Compensation Clause in cases such as this involving long-recognized, discrete interests in specific property does not imply its application to the broad range of general business regulation unrelated to specific property interests that was subject to intrusive *Lochner*-era review. *Cf. Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924) (striking down regulation of size of bread loaves on the ground that government may not "arbitrarily interfere with private business"); *Lochner v. New York*, 198 U.S. 45, 60 (1905) (invalidating law limiting employee work hours on the ground that it interfered with "liberty of person and freedom of contract").

Nor does the substantially advances test impermissibly intrude on democratic values. To the contrary, it applies in those circumstances in which this Court has long recognized that judicial intervention is proper—where an express provision of the Bill of Rights protects individuals from being singled out by the majority for disparate burdens. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). This case illustrates the point. Act 257 burdens a discrete group of six property owners, all but one of which is based outside of Hawaii—and the one Hawaii-based owner is essentially unaffected because it sells almost exclusively through company-owned stations. *See*

supra, p. 2 n.3. While it may be politically attractive to force these companies to subsidize the operations of local lessee dealers, the very nature of the disproportionate burden the statute imposes tends to insulate it from normal democratic processes. *See Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part).

Finally, and perhaps most importantly, the substantially advances test differs from substantive due process analysis in that it does not bar the government from acting. As the State itself argues at length, except where the public use requirement is not met, the Just Compensation Clause permits the government to act so long as its pays compensation for property rights taken by its action. Pet. Br. 18 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987)); *see also Eastern Enters.*, 524 U.S. at 545 (Kennedy, J., concurring in judgment) ("The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge."). Substantive due process analysis leaves no such option to the government but results instead in the invalidation of challenged governmental action outright.[14]

Significantly, the State ultimately disclaims any argument that the specific protections afforded by the substantially advances test are irrelevant to the Just Compensation Clause. Pet. Br. 36. Instead, the State asserts, those protections

[14] The State and its amici argue that a state should be free, "if its citizens chose, [to] serve as a laboratory; and try novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see* Pet. Br. 40. But it is one thing for a state to engage in such experimentation when "its citizens chose" where the citizenry will bear the burden of that experimentation. It is far different when the burden of the experiment is unfairly concentrated on discrete property rights of only certain individuals. In that circumstance, the Just Compensation Clause permits the experiment, conditioned on the payment of compensation to properly allocate the burden to the public.

should be provided under the Due Process Clause, without the "confusing intermediation of the Just Compensation Clause." *Id.* at 35-36. As the foregoing paragraphs demonstrate, however, accepting this position would result in the very "mistaken transposition" of constitutional principles the State says it is seeking to avoid. It would cheapen Just Compensation Clause values by applying a standard of review not tailored to the specific interests protected by that clause. Protecting the rights guaranteed by the Just Compensation Clause, while at the same time not improperly expanding the reach of the Due Process Clause or imposing on government the absolute limits that result from due process condemnation, calls for review of regulatory takings under the standards of the Just Compensation Clause itself.[15]

3. The Substantially Advances Test is Consistent with and Supported by the Conditional Nature of the Just Compensation Clause

The State argues that the substantially advances test is inconsistent with the Just Compensation Clause because it supposedly asks whether the "government action can proceed at all." Pet. Br. at 19. This argument is meritless.

As discussed above (at 30), determining under the Just Compensation Clause that a law fails to substantially advance a legitimate state interest does not bar the government from acting. It means only that the law effects a taking for which compensation must be paid—just as the "permanent physical occupation," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), and

[15] The fact that *Agins* cited to *Nectow v. Cambridge*, 227 U.S. 183 (1928), does not turn the substantially advances inquiry into a due process test. For the reasons discussed above, and as this Court's decisions both before and after *Agins* make clear, the substantially advances test is an inquiry under the Just Compensation Clause that serves the distinct purposes of that clause.

"economically beneficial uses," *Lucas*, 505 U.S. at 1019, tests identify takings for which compensation is owed. Thus, the Court recognized in *City of Monterey* that government action can proceed with compensation even when, as in that case, the challenged property regulation fails the substantially advances test. *See* 526 U.S. at 710 ("Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone."). Indeed, *City of Monterey* decided that the Seventh Amendment provides a right to a jury trial on the substantially advances question in a Section 1983 action *for compensatory relief*. *Id.* at 708-11. If it were true that "compensation is a non sequitur" when property regulation fails the substantially advances test, U.S. Br. 23, the issue resolved in *City of Monterey* would be meaningless.

Similarly erroneous is the State's argument that the substantially advances test is inconsistent with the Fifth Amendment's "public use" requirement. Pet. Br. 19-21. The gist of the State's argument appears to be that any law that fails the substantially advances test necessarily also fails the public use standard. The result, according to the State, is a logical conundrum—the same circumstance that dictates that a taking has occurred and compensation is owed (failure to substantially advance) also dictates that the government is precluded from taking the property at all even with compensation (lack of a public use).

But the conundrum is of the State's own making. The public use requirement and the substantially advances requirement are not the same. Because the absence of a public use precludes the government from acting at all, this Court's precedents have, as noted above, evaluated the existence of a public use under a highly deferential standard. *Midkiff*, 467 U.S. at 240-42. At the same time, however, the Court has recognized that a law that satisfies this highly deferential standard may yet be so unfair to individual property owners that it fails the substantially advances test.

Thus, in *Nollan*, *Dolan*, and *City of Monterey* there was no question the challenged action satisfied the public use requirement. *Nollan*, 483 U.S. at 835 (accepting legitimacy of state interest in preserving visual access to the ocean); *Dolan*, 512 U.S. at 387 (preventing flooding and reducing traffic congestion "qualify as the type of legitimate public purposes we have upheld"); *City of Monterey*, 526 U.S. at 706 ("the jury was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests"). Yet, in each case, the government action was found to constitute a taking for which compensation was required because the regulation failed the substantially advances requirement.

These differing standards for evaluating when the public use requirement is satisfied and when the substantially advances test is met are consistent with basic Just Compensation Clause principles. The deferential standard that governs the public use requirement is predicated on the assumption that the government will be paying for the taking. *See Midkiff*, 467 U.S. at 245 ("we assume for purposes of these appeals that the weighty demand of just compensation has been met"). The question it asks is whether the government is prohibited from acting even in that circumstance. Deferring to the government in that situation finds support in the fact that the result—permitting government action conditioned on payment—does not defeat the core purpose of the Just Compensation Clause. And a contrary outcome would prevent the government from acting at all.

Different considerations apply, however, when the government seeks to proceed without paying compensation. In that circumstance, the core purpose of the Just Compensation Clause of protecting property owners from being deprived of their property rights without compensation is directly implicated and the balance of competing interests is altered. From the property owner's perspective, the governmental intrusion is greater, as the government is seeking not

only to deprive the owner of protected property interests but to do so without any payment. At the same time, the government's interest in its proposed action is diminished because its right to act at all is not being challenged. Instead, it is allowed to proceed so long as it pays for the private property rights destroyed by its action.

Nor is the State aided by its assertion, Pet. Br. 21-23, that compensation rather than an injunction is the appropriate remedy in a takings case. Nothing in the substantially advances test dictates an injunctive remedy or other remedy different from those available in any other situation when an uncompensated taking is found. As the State acknowledges, this Court's decisions have recognized the propriety of declaratory or injunctive relief against uncompensated takings in a variety of circumstances. *See* Pet. Br. 22 n.9; *see also* U.S. Br. 22 n.11. Indeed, the principal decision on which the State relies as establishing the compensatory focus of the Just Compensation Clause itself approved relief in the form of "a judicial declaration that [an] ordinance[] has effected an unconstitutional taking of property." *First English*, 482 U.S. at 317. These decisions recognize that declaratory or injunctive relief does not prohibit the government from acting, but merely requires that the government pay for its action should it elect to continue.[16] But whether

[16] In fact, there is little practical difference between such a declaration and a court's "ordering the government to afford compensation for the permanent taking." *First English*, 482 U.S. at 335 (Stevens, J., dissenting). "The difference . . . is only in what will happen in the case of Legislative or Executive inertia," because the government can overcome the court's order either by paying just compensation or by repealing the property regulation, as the case may be. *Id.*; *see also id.* at 317 (majority op.) (government may avoid future payment obligation by electing to "acquiesce" in judicial declaration of unconstitutional taking). Moreover, a declaration or injunction is the *less* intrusive form of relief—and more consistent with the government's apparent intent—where, as here, there is no indication that the government intended to exercise its

such relief is an appropriate remedy in this or any other case has nothing to do with the validity of the substantially advances test. If injunctive relief is not proper in a given case, the proper response is to deny that remedy in favor of a compensatory remedy, not to jettison the substantive standards for determining the underlying liability question. Here, the State objected only to the substantive determination that Act 257 effects a taking absent compensation being paid. The State never contended that, assuming a substantive violation of the Just Compensation Clause is found, it was error for the district court to award declaratory or injunctive relief rather than compensation.

D. The Substantially Advances Test Is an Established Part of this Court's Regulatory Takings Jurisprudence

Labeling it "dictum" and this Court's "locution" in *Agins*, the State questions whether the substantially advances test is "actually part of current takings doctrine at all" and asserts that "nothing bars" the Court from now abandoning it. Pet. Br. 23, 25, 29. These contentions are without merit.

The State asserts that the Court's application of the test in *Agins* was dictum because the Court concluded that the test was met. But the fact that a test is satisfied does not mean that it is not the test. The State cites no authority holding that the Court's pronouncement of a governing constitutional standard is dictum whenever the standard is applied to uphold rather than invalidate the challenged action. This Court's decisions reject that assertion. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996) ("rationale upon which the Court based the results of its earlier decisions" is

taking power when it enacted the statute. *Id.* at 317 ("[T]he landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking.").

not dicta); *id.* at 67 ("'As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.'") (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting)). If the rule were as the State contends, countless decisions of this Court could be disregarded as dictum, including the modern substantive due process cases and the public use cases on which the State relies, each of which sustained the laws at issue. Indeed, under the State's standard, *Penn Central* itself would be dictum.

Nor has this Court treated *Agins* as dictum. Less than a year after *Agins* was decided, Justice Brennan described *Agins* as a "clear precedent[]" that a regulation effects a taking if it "does not substantially advance legitimate state interests." *San Diego Gas & Elec.*, 450 U.S. at 647 (Brennan, J., dissenting). In *Keystone*, the Court described *Agins* as a holding that "land use regulation can effect a taking if it does not substantially advance legitimate state interests." 480 U.S. at 485 (internal quotation marks omitted). The Court identified this standard as an "integral part[] of our takings analysis." *Id.* In *Nollan*, the Court stated, citing to *Agins*, that it has "long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'" 483 U.S. at 834. And the Court applied the substantially advances test to invalidate governmental action in *Nollan* and *Dolan*. These cases are irreconcilable with any notion that *Agins*' articulation and application of the substantially advances test was anything less than a holding of the Court. At most, the fact that *Agins* and other cases have found the test satisfied simply means that it imposes a relatively minor burden that the government can easily meet, except where (as here) the government has singled out discrete property interests that are not the source of any condition the government seeks to address.

The State's "dictum" contention also ignores that *Agins* itself merely restated a requirement the Court had already

recognized in its prior cases. As discussed above, the test was first expressly articulated in *Penn Central*, 438 U.S. at 104. And as *Lucas* observed, 505 U.S. at 1023-24, its "progenitor" is found in the Court's "noxious use" cases, which predicated the government's ability to take property without compensation on a causal connection between the property's use and the social condition the state was acting to address. Repudiating the substantially advances requirement would thus be repudiating not merely *Agins* but basic principles that have guided this Court's regulatory takings jurisprudence for over eighty years.

Nor is there any merit to the State's assertion that "five Justices" rejected the substantially advances test in *Eastern Enterprises*. Neither the validity nor the application of the substantially advances test was at issue in that case. The plurality concluded that the law was invalid under the general *Penn Central* analysis, without any need to focus on the more particular substantially advances requirement. *Eastern Enters.*, 524 U.S. at 529-37. The plurality relied primarily on the severe and unanticipated retroactive nature of the liability, concerns that do not directly implicate the substantially advances requirement.

Justice Kennedy concurred in the judgment, concluding that the law's validity should be analyzed under the Due Process Clause rather than the Just Compensation Clause. Contrary to the State's assertion, Pet. Br. 30, however, Justice Kennedy's disagreement with the plurality was not over the validity of the substantially advances test (which the majority had not applied). Instead, he concluded that the Takings Clause was inapplicable because the Coal Act "does not operate upon or alter an identified property interest." 524 U.S. at 540. He reasoned that the Court's regulatory takings cases have involved "specific and identified properties or property rights." *Id.* at 541. By contrast, the Coal Act "simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how

the regulated entity elects to comply or the property it uses to do so." *Id.* at 540.

The State relies on Justice Kennedy's observation that the "normative judgment[s]" required by the Court's regulatory takings doctrine are in "uneasy tension" with the understanding of the Just Compensation Clause as not prohibiting governmental action. *Id.* at 544-45. But this observation cannot be read as repudiating the substantially advances test. As Justice Kennedy observed, *id.*, the nature of the Just Compensation Clause itself inherently requires normative judgments about the "fairness and justice" of imposing burdens on discrete property owners. *Armstrong*, 364 U.S. at 49. Moreover, as discussed above (at 13-17), regulatory takings doctrine from the beginning has required inquiry into the character of the government's interest, including the relationship between the asserted interest and the burdens imposed on property. Justice Kennedy noted the "difficult and uncertain" nature of these inquiries not to suggest that the regulatory takings doctrine be abandoned, but to support his conclusion that the Court should adhere to the "one constant limitation" that the inquiry be restricted to cases in which "a specific property right or interest" is at stake. 524 U.S. at 541. Likewise, he did not suggest that due process analysis should replace scrutiny under the Just Compensation Clause. Instead, he concluded that the Court should "proceed *first* to general due process principles," and then proceed to takings analysis if the government's action passes muster under those principles. *Id.* at 546 (emphasis added).

Similarly, Justice Kennedy's observation that the plaintiff's challenge to the Coal Act "appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation," *id.* at 545, was a reflection of the peculiar nature of the generalized economic loss the plaintiff alleged in that case, rather than a universal statement about every case in which the substantially advances test is at issue. Where, as in this case, a "specific property right or interest" is at stake, a claim of an

uncompensated regulatory taking falls squarely within this Court's Just Compensation Clause precedents.[17]

The State's assertion that *Eastern Enterprises* overruled *Agins* and abandoned the substantially advances test is also contradicted by this Court's subsequent decisions describing the test as consistent with the Court's regulatory takings precedents, *City of Monterey*, 526 U.S. at 704, and as a theory under which a regulatory taking may be established, *Tahoe-Sierra*, 535 U.S. at 334. While the State observes that the propriety of the test was not directly at issue in those cases, it would be strange indeed for the Court to have approvingly referred to the test if it had already rejected it (or fatally undermined it) only shortly before.

II. THE JUST COMPENSATION CLAUSE REQUIRES MORE THAN MERE RATIONALITY

A. The State's Argument Is Inconsistent with This Court's Precedents and the Purposes of the Just Compensation Clause

The State's argument that the Just Compensation Clause imposes no more than rational basis review is largely a reprise of its argument that the Due Process Clause provides the governing standard here—and it is wrong for the reasons already discussed. Contrary to the State's argument that deferential review is required whenever economic legislation is involved, "regardless of the specific constitutional provision invoked," Pet. Br. 37, 39, this Court has repeatedly

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[17] Justice Kennedy also found support for his conclusion that the Due Process Clause, rather the Just Compensation Clause, applied in the fact that the principal focus of the plaintiff's complaint—the retroactive nature of the economic liability imposed by the Coal Act—fits within the "well-settled due process principles respecting retroactive laws." *Id.* at 547. By contrast, a claim that a regulation unfairly imposes burdens on specific property interests unrelated to any problem caused by the property is most directly a Just Compensation Clause issue.

applied higher levels of scrutiny to economic legislation when that legislation is alleged to violate specific constitutional guarantees, such as the Just Compensation Clause. *See supra*, pp. 24-26. The State's assertion that "[n]othing in the Just Compensation Clause," Pet. Br. 40, supports more searching scrutiny ignores the distinct purposes that the Just Compensation Clause serves, as well as the lesser, conditional burden it places on governmental behavior as compared to other constitutional provisions. *See supra*, pp. 26-31.

The State's argument is also inconsistent with this Court's pronouncements on this very subject. In *Nollan*, the Court emphasized that the standard for evaluating a substantially advances claim under the Just Compensation Clause is not the same as that applied to due process and equal protection claims: "We have required that the regulation substantially advance the legitimate state interest sought to be achieved, not that the State *could rationally have decided* that the measure adopted might achieve the State's objective." *Nollan*, 483 U.S. at 834 n.3 (quotation marks and citation omitted). The Court thus rejected the dissenting opinion's reliance on the very same due process and equal protection precedents that the State now cites as establishing the proper standard of review. As the Court recognized,

> there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges and First Amendment challenges are identical.

Id. The State tries to dismiss this rejection of its position as limited to the "exactions" context. Pet. Br. 48 n.18. But the Court was describing the operation of the substantially

advances test in general, not its particular application in the exactions context. It thus relied on *Agins* and *Penn Central*, neither of which were exactions cases.[18]

Nor is there any merit to the State's attempt to recast *Agins* and other more recent takings cases as requiring only mere rationality. Pet Br. 42-48. The Court in *Agins* affirmatively concluded that the zoning ordinances at issue there would substantially advance the city's goals, not merely that the city might have rationally so concluded. 461 U.S. at 261-62.

The State likewise mischaracterizes the debate between the majority and dissent in *Keystone*. Pet. Br. 45-47. There was no question in that case that the property use at issue was causally connected to the subsidence problem the state was seeking to address. Nor was there any question that the statute would protect against subsidence. The majority was therefore not addressing those issues—which are the focus of the substantially advances test—but instead was concerned with whether the "true nature" of the statute was to protect against public harms or merely to protect the private interests of certain surface landowners. The majority concluded that the various provisions of the statute showed that it was intended to protect against public harms, in contrast to the Coal Act in *Mahon*, which Justice Holmes described as a "'private benefit' statute." *Keystone*, 480 U.S. at 485-88; *see Mahon*, 260 U.S. at 413-14.

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[18] The Court rejected any contrary assumption made in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), not on the ground that *Goldblatt* was not an exactions case, but on the ground that any such assumption in *Goldblatt* was inconsistent with "our later cases." *Nollan*, 483 U.S. at 834 n.3. By referring to "our later cases," the Court made clear that it was not announcing a new standard in *Nollan* limited to exactions cases, but was referring to a standard already established in prior, non-exactions cases.

It was in that context of evaluating the nature of the legislature's purposes that the *Keystone* dissenting opinion observed that the Court's "inquiry into *legislative purpose* is not intended as a license to judge the effectiveness of legislation," 480 U.S. at 511 n.3 (Rehnquist, C.J., dissenting) (emphasis added)—a point with which the majority said it agreed, *id.* at 487 n.16. But neither the majority nor the dissent said anything about the level of scrutiny to be applied when the issue is not the nature of the legislative purpose (*i.e.*, the extent to which it was intended to protect against private as opposed to public harms), but is instead whether the statute unfairly singles out property owners to remedy problems not attributable to the burdened property.[19] Nor are the issues the same. Deferring to the legislature in the context of identifying the purposes the legislature intended the statute to serve is a far cry from holding that the legislature's view is controlling on whether the statute violates the core purpose of the Just Compensation Clause of preventing the government from singling out individual property owners for burdens that should be borne by the public as a whole.

The State also errs in suggesting that *City of Monterey* supports deferential review. Pet. Br. 46-47. The State relies on *City of Monterey*'s holding that the "rough-proportionality" requirement applied in *Dolan* is limited to exactions cases. That holding, however, was simply a

[19] That the issue being debated was the general nature of the legislative purpose is evidenced by Chief Justice Rehnquist's reliance on *Midkiff*, which involved the "public use" requirement of the Fifth Amendment, not the substantially advances standard. *See* 480 U.S. at 511 n.3. Significantly, after noting the Court's reticence to question the government's purposes, Chief Justice Rehnquist warned that the fact that the legislation may "efficiently achieve[] its desired objectives" does not establish that "the compensation required by the Fifth Amendment is unavailable." *Id.*

recognition that that specific requirement "is not readily applicable" when the claim is that development was denied outright rather than conditioned on "excessive exactions." 526 U.S. at 703. The Court did not suggest that the more general requirements of the substantially advances test are limited to the exactions context—including the basic requirement that a nexus exist between the property burdened and the problem the government seeks to address. Nor did it hold that courts are limited to mere rationality review when applying that test. The Court's recognition that the jury instructions given in that case setting out the substantially advances test were consistent with the Court's regulatory takings precedents belies any such conclusion. *Id.* at 704; *see also id.* at 707 (rejecting as "contrary to settled regulatory takings principles" the city's argument that its land use decisions are "immune from judicial scrutiny").

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981), also does not help the State. No claim was made in that case under the Just Compensation Clause—let alone any claim that the ordinance failed the substantially advances test under that clause. Instead, the contention was that the ordinance violated the appellants' rights of expression under the First Amendment. The Court thus had no occasion to address the standard that would have applied to a Just Compensation Clause claim, had one been made.

The State places particular reliance on *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), asserting that applying meaningful scrutiny under the Just Compensation Clause would mean that the result in that case would have been different if only the oil companies there had "relabeled" their due process claim as a takings claim. Pet. Br. 42. The statute in that case, however, was significantly different from Act 257. It did not take a discrete property right (such as the right to collect rents from real property) or attach to any real property a restriction on that property's use. It was instead a general restriction on the retail distribution avenues oil companies could use. Applying the Just Compensation

Clause here says little or nothing about its application to such a regulatory scheme governing the oil companies' conduct. Moreover, assuming that the substantially advances test would apply to the Maryland law, the question would be whether the prohibited station operations were the source of the problem the legislature sought to address and whether the burden was sufficiently related to the law's purposes. Unlike the statute here, the Maryland statute was enacted in response to evidence that the oil companies there were allocating oil supplies in times of shortage to their own stations to the exclusion of other distribution avenues. 437 U.S. at 121. The outcome of the inquiry into the validity of that statute would not necessarily be the same as it would be for the different statute here.

The State suggests that rational basis review is proper because all property owners hold their property with the understanding that the government may regulate its use to serve the public good. Pet. Br. 40. But this only proves the point. Property owners do not expect that their property will be taken without compensation for the stated purpose of addressing problems that their property did not create or that will not be ameliorated by the policies at issue. The purpose of the Just Compensation Clause is precisely to prevent the government from unfairly burdening protected property rights in that fashion. The government should not be permitted to evade this guarantee by application of a toothless standard of review that provides no meaningful check on the very evils the Just Compensation Clause was adopted to prevent.

B. Meaningful Scrutiny Under the Just Compensation Clause Does Not Require *De Novo* Review

At bottom, the State's argument that only rational basis scrutiny is appropriate rests on the premise that the only alternative is "*de novo*" review in which the courts accord "no weight whatsoever" to legislative economic policy judgments. Pet. Br. 38, 42. That premise is unfounded.

Meaningful scrutiny does not require *de novo* review. Nor is *de novo* review necessary to find that the statute here effects an uncompensated taking in violation of the Fifth Amendment.

As the United States recognizes, even where intermediate scrutiny applies, legislative judgments may be entitled to deference. U.S. Br. at 13 n.4. Thus, in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), the Court held that Congress' "predictive judgments" are entitled to "substantial deference." *Id.* at 665. At the same time, however, the Court made clear that deference does not mean that legislative judgments are "insulated from meaningful judicial review." *Id.* at 666. The government "must do more than simply posit the existence of the disease sought to be cured." *Id.* at 664 (internal quotation marks omitted). It is required instead to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* The courts' obligation is to exercise their "independent judgment" to assure that "Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 666; *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (restriction on commercial speech may not be sustained on the basis of "mere speculation or conjecture").

Ultimately, the Court upheld the statute challenged in *Turner*. But it was only after first remanding the case for a "more substantial elaboration" of the actual evidence supporting the statute, 512 U.S. at 667, and only after concluding that Congress' detailed findings, reached after three years of preenactment hearings and set forth in the act itself, were in fact supported by the extensive body of evidence Congress had amassed, *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 197-210 (1997).

Here, the opposite is true. Act 257 is not accompanied by any legislative findings that rents charged to lessee dealers are the cause of high gasoline prices in Hawaii, that

controlling rent will lower gasoline prices, or that the rent levels that are prohibited by the State pose any threat to the ability of lessee dealers to remain in business, either individually or as a whole. Nor did the State make any showing that the Legislature had investigated these issues or gathered any evidence that might demonstrate that rent charged to lessee dealers was a problem or that controlling it might be a solution. Instead, the State relied solely on the testimony of its litigation expert as the basis for the validity and effectiveness of the burden its statute imposed. The State made no attempt to demonstrate that this expert's trial opinions correlated in any way with anything the Legislature ever considered or concluded. To the contrary, it was clear that the expert was engaged solely in an after-the-fact effort to devise some theory by which the statute might be thought to accomplish some legitimate goal.[20] The State cites no authority suggesting that this kind of testimony constitutes a "legislative judgment" on an issue of "public policy" to which a district court exercising the scrutiny mandated in Just Compensation Clause cases must defer.

Even if the litigation testimony of an expert could substitute for the legislature's own judgment, the State is incorrect in asserting that the validity of Act 257 under the substantially advances test involves resolving conflicting evidence or deciding which party's evidence is more persuasive. As discussed above (at 3, 6), the State's expert did not present any evidence that Chevron's rents to lessee dealers have been the cause of any problem Act 257 seeks to address. To the contrary, he affirmatively disavowed any

[20] *See* JA 127-35 (describing how the State's expert and a deputy attorney general worked after the statute was enacted to try to devise a way "to show that the rent control would combat the problems with the high concentration that the legislature was talking about;" "I was looking for a connection between the rent control aspects of the bill and wholesale—high wholesale prices.").

such contention and the State makes no claim otherwise. Nor could it, given that the rents Chevron has charged have not covered Chevron's expenses and that lessee dealers far outnumber company-operated stations and are the predominant avenue through which Chevron and other refiners sell their gasoline. Thus, no second-guessing of any legislative economic policy judgment or picking between competing expert views is required to conclude that the State has taken property rights here that have not contributed to any problem the State seeks to correct or interfered with any purpose the State seeks to advance.

Even on the question whether Act 257 will achieve any legitimate purpose (putting aside that it targets property rights that have not caused any problem), no resolution of conflicting evidence is necessary. The State does not contend that taking Chevron's rents and transferring them to dealers will cause those dealers to lower their gasoline prices. To the contrary, both it and its expert conceded that that will not happen. *Supra*, p. 4. Nor is there any conflict in the evidence that, to the extent the oil companies do not raise their wholesale gasoline prices in response to the lost rental revenue (which the State's expert conceded would cause retail prices to increase, contrary to the State's goals), the effect of the statute will be to decrease the oil companies' incentive to invest in lessee-dealer stations.[21]

[21] The State emphasizes the district court's statement that it found "more persuasive" Chevron's expert's conclusion that the oil companies would respond to lost rent by raising their wholesale gasoline prices. Pet. Br. 38 (citing Pet. App. 43). But neither the district court's ultimate ruling, nor the constitutionality of Act 257, turns on that conclusion. To the extent that oil companies are not able to raise their wholesale prices, it was undisputed (and the district court found) that the effect will be to put money in the dealers' pockets and create a disincentive to investment in lessee-dealer stations—contrary to the State's goals. And none of this

That leaves the State's contention that the law at least serves the purpose of preventing oil companies from in the future engaging in rent increases that might drive lessee dealers out of business. But on this issue as well, no legislative economic policy judgment or conflicts in the evidence are involved. First, the Hawaii Legislature made no finding that Chevron or any other company has sought or likely will seek to drive lessee dealers out of business in Hawaii by charging excessive rents. Nor did the State's expert make any such assertion—let alone identify any evidence that would support such an assertion. To the contrary, he admitted he was unaware of any such evidence. *Supra*, pp. 3, 6. Moreover, neither the State nor its expert has offered any explanation for why it would make any sense for an oil company to run lessee dealers out of business for the purpose of replacing them with company-operated stations when Hawaii law separately prohibits oil companies from converting lessee-dealer stations to company-operated stations or from opening any company-operated stations in the proximity of a lessee-dealer station. Pet. Br. App. 2-3.[22]

changes the basic problem that the statute burdens property rights that are not claimed to have caused any problem.

[22] The State suggests that a rent cap is necessary to prevent oil companies from circumventing the conversion prohibition by accomplishing conversion "indirectly." Pet. Br. 3. But the conversion prohibition contains no exception for instances in which the lessee dealer goes out of business. In that circumstance, the company is allowed to operate the station only for up to 24 months until a replacement dealer can be found. Pet. Br. App. 2-3. If no replacement dealer is found, the company remains barred from taking over operation of the station or from opening a new company-operated station in the immediate vicinity.

Act 257 does not prevent oil companies from converting lessee-dealer stations to open-dealer stations (*i.e.*, stations both owned and operated by the dealer). But because such dealers are independent of the oil company, the State makes no claim that such conversions threaten any purpose behind Act 257.

Given the specific protection for property rights afforded by the Just Compensation Clause, the State was required at least to identify some credible evidence suggesting the likelihood of the posited harm before taking property to avert that harm. *See Turner*, 512 U.S. at 664, 666 (merely "posit[ing] the existence of the disease sought to be cured" is insufficient; it must be shown "that the recited harms are real, not merely conjectural" and the government's "inferences [are] based on substantial evidence").[23]

But even had the Hawaii Legislature made a considered judgment that oil companies were likely to raise their rents "to the point that existing dealers would be forced out of business," Pet. Br. 3, it made no judgment that the rents prohibited by Act 257—*i.e.*, the rents that the State stipulated that Chevron would charge absent the statute—would have that effect. The result of Act 257 is therefore to deprive Chevron of a property interest that is not even claimed to have any relation to any purpose advanced by the State. The only effect of prohibiting Chevron from charging the rents it would have charged absent Act 257 is to appropriate and transfer to lessee dealers a valuable property interest belonging to Chevron. No principle of deference is violated by giving effect to the express protections of the Just

[23] The State wrongly claims, Pet. Br. 3 n.1, that Congress passed the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* (the "PMPA"), out of concern that oil companies would use rent increases to eliminate lessee dealers as independent competitors. In fact, neither the text nor the legislative history of the PMPA expresses any basis for that statute in concerns about competition. Rather, the PMPA is directed toward protecting dealers (not consumers) from perceived undue leverage that could be exerted by the oil companies, a goal that the State expressly disclaims for Act 257 at page 4 of its brief. The State cites S. Rep. No. 102-450 (1992) (Senate Comm. on Judiciary), to show that concerns about competition "led Congress to enact the" PMPA. But that Senate report was issued 14 years *after* the PMPA was enacted and accompanied a bill that was not passed in either house of Congress.

Compensation Clause against such governmental appropriation of private property interests.[24]

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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[24] The State's petition is limited to the validity of the substantially advances test and the standard of review. Assuming that the test is valid and that it requires more than mere rationality, the State does not challenge the rulings of the courts below that Act 257 effects a taking. Nor would any such challenge have merit. For reasons discussed above, the rent control provisions of Act 257 impose the kind of unfair, disproportionate burden on discrete property rights that the Just Compensation Clause prohibits absent compensation.